

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL DIVERSITY,)	Case No. 2:13-cv-01866-JLR
)	
Plaintiff,)	AMICI SCIENTISTS'
)	RESPONSE TO DEFENDANTS'
v.)	MOTION TO STRIKE EXTRA-
)	RECORD MATERIALS IN AMICI'S
UNITED STATES ENVIRONMENTAL)	BRIEF
PROTECTION AGENCY, ET AL.,)	
)	
Defendants.)	
)	
)	

**RESPONSE TO DEFENDANT'S MOTION TO STRIKE EXTRA-RECORD
MATERIALS IN AMICI'S BRIEF**

Amici respectfully urge the Court to deny the Defendants' motion to strike references in amici's brief, for the following reasons.

First, these references were provided by two of the world's leading scientists on ocean acidification to assist the court in understanding the science involved, the nature of the risks presented, and the broader policy implications of this case. *See* Reagan Wm. Simpson, *How to*

CENTER FOR BIOLOGICAL DIVERSITY v. EPA
AMICI SCIENTISTS' RESPONSE TO DEFENDANTS'
MOTION TO STRIKE EXTRA-RECORD MATERIALS
No. 2:13-cv-01866-JLR

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1 *Be a Good Friend to the Court: Strategic Use of Amicus Briefs*, 28 Brief 38, 39 (Spring 1999).
 2 As noted by Justice Breyer, amici scientists “play an important role in educating the judges on
 3 potentially relevant technical matters, helping make us not experts, but moderately-educated lay
 4 persons, and that education helps to improve the quality of our decisions.” Stephen Breyer, *The*
 5 *Interdependence of Science and Law*, 82 *Judicature* 24, 26 (July/August 1998).

6 Second, contrary to defendants’ unduly restrictive view of the record review rule, the
 7 Ninth Circuit has recognized that “the courts are not straightjacketed to the original record in
 8 trying to make sense of complex technical testimony, which is often presented in administrative
 9 proceedings without ultimate review by non-expert judges in mind.” *Bunker Hill Co. v. EPA*,
 10 572 F.2d 1286, 1292 (9th Cir. 1977). In *Bunker Hill*, both EPA and the industry petitioner were
 11 allowed to augment the record with additional expert evidence regarding the basis for EPA’s
 12 requirement for additional emissions control.
 13

14 Further, a reviewing court “may go outside the record: (1) to determine whether the
 15 agency considered all relevant factors . . . ; (2) to determine whether the agency’s ‘course of
 16 inquiry was sufficient or inadequate’ . . . ; (3) when it is necessary to explain the agency’s action;
 17 (4) when the agency has relied on evidence outside the record; and (5) to explain technical terms
 18 or complex subject matter. . . .” *Hells Canyon Preservation Council v. Jacoby*, 9 F. Supp. 2d
 19 1216, 1223 (D. Or. 1998). The information submitted by these amici scientists, consisting of
 20 citations to peer-reviewed literature supporting their opinions on the causes and consequences of
 21 ocean acidification, falls squarely within category (5), and also fits within categories (1) and (2).
 22

23 Explaining these categories, the Ninth Circuit has noted that it is appropriate to “consider
 24 evidence relevant to the substantive merits of the agency action only for background

1 information...or for the limited purposes of ascertaining whether the agency considered all the
2 relevant factors or fully explicated its course of conduct on grounds of decision.” *Asarco, Inc. v.*
3 *U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). That is all that these amici seek. Amici
4 maintain that there is sufficient scientific evidence of the threats posed by ocean acidification to
5 warrant the listing of coastal waters in the Pacific Northwest as impaired within the meaning of
6 the Clean Water Act, and offer their expert opinion, supported by the material cited in the brief,
7 for the court’s consideration. Amici respect that the principal focus of the court’s review is on
8 the administrative record in existence at the time the decision was made but suggest that the
9 court should consider the information they provided in determining whether EPA’s interpretation
10 of the available evidence was reasonable in light of its own guidance on making listing
11 determinations under §303(d) of the Clean Water Act.
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25 CENTER FOR BIOLOGICAL DIVERSITY v. EPA
26 AMICI SCIENTISTS’ RESPONSE TO DEFENDANTS’
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Respectfully submitted this 17th day of September, 2014.

s/ Patrick Parenteau

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Counsel for parties participating in electronic service via the CM/ECF system for Case No. 2:13-cv-01866-JLR.

Dated September 17, 2014

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